



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

ELP
Docket No. 7049-99
3 March 2000

[REDACTED]

Dear [REDACTED],

This is in reference to your application for correction of your naval record pursuant to the provisions of Title 10, United States Code, Section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 1 March 2000. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. The Board also considered the advisory opinion, dated 21 January 2000 from the Navy Personnel Command, a copy of which is attached.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice.

The Board found that you reenlisted in the Navy on 19 December 1994 for four years as an RM3 (E-4). At the time of your reenlistment, you had completed three years of prior active service.

The record reflects that you served without incident until 28 November 1995 when you received nonjudicial punishment (NJP) for dereliction of duty and failure to obey a lawful order. You served without further incident until 16 July 1996 when the commanding officer (CO) requested a waiver of the requirement to process you for separation. In his letter of that date, the CO noted that you fraudulently reenlisted by failing to set forth your full arrest record and military disciplinary record on DD Form 398 (Statement of Personal History) submitted on

22 November 1994. This history included an NJP in July 1992 for failure to obey a lawful order, disrespect, resisting apprehension, and drunk and disorderly conduct; arrests for unlawful use of a weapon in July 1993; driving while intoxicated, assault, operating a vehicle without insurance, and failure to wear a seat belt in May 1994; and a probation violation in July 1994. The Chief of Naval Personnel approved the waiver, advised the command to retain you and directed that a counseling and warning statement be entered in your record.

On 7 January 1997, you received a second NJP for consuming an alcoholic beverage on board ship in violation of a lawful general regulation. Punishment imposed was three days of restriction and 30 days of extra duty.

The record further reflects that you were a selectee for advancement to RM2 (E-5) from the September 1997 advancement examination. You were advanced to RM2 on 1 January 1998. However, the Evaluation Report and Counseling Record for the period ending 15 March 1998 withdrew a recommendation for further advancement due to significant problems. The reporting senior stated that you lacked the maturity and the seasoned demeanor required for the next pay grade. He noted that you were counseled on three occasions for improper transmission of an outgoing message, improper downloading of incoming messages resulting in the failure to deliver 46 incoming messages; and for defiant behavior toward superiors and a misuse of authority as duty master-at-arms. On 25 September 1998, you were further counseled regarding an unauthorized absence. Despite the foregoing, you were allowed to reenlist for three years on 10 December 1998.

The Board noted your contentions to the effect that the 7 January 1997 NJP should be removed from the record because applicable procedures prior to and after NJP were not followed in that you were never advised of your rights, given an opportunity to consult with legal counsel prior to the NJP, and were not given an opportunity appeal the NJP. The Board also noted that the NJP documentation considered in your case no longer exists since the command is only required to retain it for two years. The Board further noted the documentation you submitted with your application which included the Report and Disposition of Offenses and Acknowledgement and Waiver of Rights. While none of these forms contain your signature, the Board has no way of knowing whether these are true copies of documentation from your NJP. Further, the Board was not convinced that you were not advised of your rights. In most cases, the commanding officer goes over an individuals rights again at NJP. It appeared to the Board you definitely knew what your rights were because this was the third

time in your career you had appeared at NJP proceedings. There is no right for an accused to consult with counsel prior to NJP; however, commanding officers are encouraged to permit an accused to so consult subject to the immediate availability of counsel, delays involved, or operational commitments. Failure to provide the opportunity for an accused to consult with counsel prior to NJP does not preclude the imposition of punishment. Concerning your right to appeal, the Board noted that a CO will normally advise an individual of this right upon completion of the NJP proceedings. Further you have not submitted anything to show that an appeal would have been successful. The Board concluded you have provided insufficient exculpatory evidence to warrant removal of the contested NJP from the record.

The Board conducted a careful search of your record for any mitigating factors which would warrant correcting your record to show that you were advanced to RM2 from the March 1997 examination instead of the September 1997 examination. However, no justification for such a correction could be found.

In this regard, the Board substantially concurred with the comments contained in the advisory opinion from the Navy Personnel Command. You contend that prior to your transfer from the ship in February 1998, you inquired about taking the March 1997 service-wide examination for RM2. You claim that when you arrived at the transient personnel unit you were told that the examination had already be administered. You provide no evidence to support your contentions such as a statement from the command that an examination had been ordered and arrangements were made for you to take the examination enroute to a new duty station. Examination dates are publicized well in advance of the scheduled date. Therefore, it appeared to Board you had no excuse for missing a scheduled examination. Further, the Board was not convinced that you were recommended for advancement in March 1997 since you had received the contested NJP just a month prior to your transfer. If you were recommended for advancement at the time of your transfer, there would have been no need for the receiving command to verify your eligibility to take a late examination. The Board concluded there is not basis for granting your request.

Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records.

Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosure



DEPARTMENT OF THE NAVY
NAVY PERSONNEL COMMAND
5720 INTEGRITY DRIVE
MILLINGTON TN 38055-0000

1430
Ser 85/0115
21 Jan 00

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL
RECORDS (BCNR)


Via: Assistant for BCNR Matters (PERS-00XCB)

Subj: COMMENTS AND RECOMMENDATIONS IN THE CASE OF
RM2(SW) [REDACTED] USN, [REDACTED]

Ref: (a) BUPERSINST 1430.16D

Encl: (1) BCNR file #07049-99

1. Based on policy and guidelines established in references (a) and (b), enclosure (1) is returned recommending disapproval.
2. As stated in reference (a), Permanent Change of Station leave is not sufficient justification for a substitute examination.


F. L. COX
By direction